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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. [redacted]67

NASHVILLE MILK COMPANY,
Petitioner,

vs.

CARNATION COMPANY,
Respondent.

BRIEF OF NASHVILLE MILK COMPANY, PETITIONER.

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NOTE: (Because of the numerous references in the brief to the sections of the Robinson-Patman Act and various sections of the Clayton Act, references to those sections here have been omitted.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 699.

NASHVILLE MILK COMPANY,

Petitioner,

vs.

CARNATION COMPANY,

Respondent.

BRIEF OF NASHVILLE MILK COMPANY, PETITIONER.

REFERENCE TO THE REPORT OF OPINION OF THE COURT OF APPEALS.

The opinion of the Court of Appeals, 7th Circuit, sought to be reviewed is reported in 238 F. (2d) 86.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED.

The judgment of the Court of Appeals sought to be reviewed was entered November 1, 1956. No petition for rehearing was filed. The statutory provision conferring jurisdiction on the court to review the judgment of the Court of Appeals is 28 U. S. C. Sec. 1254(1). The petition for certiorari was filed January 19, 1957 and was granted March 4, 1957.

STATUTE WHICH THE CASE INVOLVES.

The statute which this case involves is Sec. 3 of the Robinson-Patman Act (49 Stat. 1526; 15 U. S. C. Sec. 13-A) which reads as follows:

> "Sec. 3. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competititon or eliminating a competitor.
>
> Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both."

THE QUESTION PRESENTED FOR REVIEW.

The question presented for review is as follows:

Is a party (here the petitioner) injured by a violation of Sec. 3 of the Robinson-Patman Act (49 Stat. 1526; 15 U. S. C. Sec. 13-A) entitled to sue the party committing the injury (here the respondent) for damages and injunctive relief under the provisions of Secs. 4 and 16 of the Clayton Act (38 Stat. 730; 15 U. S. C. Secs. 15 and 26)?

STATEMENT OF THE CASE.

I.

SUMMARY OF PROCEEDINGS IN THE DISTRICT COURT AND COURT OF APPEALS.

Petitioner filed suit for damages and injunctive relief under 15 U. S. C. Secs. 15 and 26 bottomed upon a violation by respondent of 15 U. S. C. Sec. 13-A. Respondent filed a motion to dismiss in the District Court. (R. 10.) The District Court overruled the motion as to two of the grounds, but sustained it as to the third and entered judgment against petitioner dismissing the complaint. (R. 11.)

Petitioner appealed to the Court of Appeals, 7th Circuit, raising as error the ground upon which the District Court had ruled adversely to it. Respondent, relying upon the proposition it might seek to sustain the judgment of the District Court on any of the grounds raised below (*Gallagher and Speck, Inc.* v. *Ford Motor Company*, 226 F. (2) 728, 7th Circuit, (1955), raised as error the two grounds upon which the District Court had ruled adversely to it. Thus, the case was submitted to the Court of Appeals upon three issues. The court affirmed the judgment of the District Court upon one of the issues raised by respondent, but did not pass upon the other two issues. The question presented for review by this petition is the issue determined by the Court of Appeals.

2.

SUMMARY OF THE COMPLAINT.

The complaint is set forth in full in the record at pages 2-10. The following is a summary of it:

Plaintiff manufactures and sells filled milk in Illinois where filled milk may be lawfully sold. Defendant likewise manufactures and sells filled milk in Illinois. Defendant and its subsidiaries, the stock of which is owned by defendant, own and operate 30 factories in more than 20 states for the processing of filled milk. Defendant's principal office is in California from which it directs the manufacture and sale of its filled milk in Illinois. It maintains a sales office in St. Louis, Missouri with a territory in Illinois from where it conducts an advertising campaign for the sale of filled milk in the Illinois territory. Such advertising campaign consists of newspaper, radio and television advertising transmitted from Missouri into Illinois. Its salesmen enter Illinois from Missouri and take orders for filled milk. Such orders are then transmitted by the salesmen by mail or otherwise from Illinois to defendant's office in Missouri. Thereupon defendant sends directions from Missouri to its factory in Illinois for the filling of the Illinois orders. It also transmits invoices from Missouri to its Illinois factory showing the name and address of the Illinois customers and the amount of filled milk to be shipped to each customer. Defendant ships raw materials into Illinois for the manufacture of filled milk. Defendant's cost of manufacturing and selling filled milk in Illinois is paid by checks drawn by it on California banks and delivered by it to payees in Illinois and later accepted for payment in California.

Defendant has violated 15 U. S. C. Title 13-A in that it has sold or contracted to sell its filled milk at unreasonably

low prices for the purpose of destroying the competition of the plaintiff in the sale of its filled milk. Such conduct has occurred in the course of commerce through the means and methods by which defendant advertises, sells and directs the sale of its filled milk in Illinois. As a direct result plaintiff has been unable to compete with defendant and has lost numerous customers to defendant attracted by its unreasonably low prices.

The complaint concludes with a demand for judgment of $1,050,000 and a prayer for injunction.

SUMMARY OF ARGUMENT.

I. Identical bills were introduced in the Senate (S. 3154) and the House (H. R. 8442). Each bill was amended and passed in the respective branch of Congress in which it was introduced. The Senate refused to concur in the House bill. A Conference Committee was appointed and the Senate and House adopted the report of the committee, which is the Robinson-Patman Act consisting of four sections. Sec. 3 had its origin in the Borah-Van Nuys amendment to S. 3154, later adopted by the Conference Committee as Sec. 3. Remarks by Senator Borah disclose that he intended that a violation of the amendment he offered was to afford the injured party a suit for damages. Remarks by members of the House upon consideration of the Conference Committee report similarly interpreted Sec. 3.

II. The entire Robinson-Patman Act amended the Clayton Act and has done no more than to widen the horizon of original Sec. 2 of the Clayton Act in dealing with monopoly. This conclusion is supported by the nature of the Robinson-Patman Act, all sections being integrated and inter-related parts of a whole dealing with monopolistic practices of the same general nature. The conclusion is also supported by Sec. 2 of the act which describes the act as "this amendatory Act." A law is amended when it is permitted to remain and something is added to it to better accomplish its purpose.

III. The House Judiciary Committee has been charged by an act of Congress with this duty of supervising the preparation of the U. S. Code. In the 1940 and subsequent Codes, Sec. 3 of the Robinson-Patman Act was included in the Clayton Act as one of the anti-trust laws as defined

by that act. That constitutes an administrative construction that Sec. 3 became part of the Clayton Act, and Congress having passed no legislation to reject such construction, it is entitled to great weight.

IV. In *Bruces Juices* v. *American Can Co.*, 330 U. S. 743, 1947, this court construed Sec. 3 of the Robinson-Patman Act as giving a party injured by its violation the right to sue and recover treble damages. In the case of *Moore* v. *Mead's Fine Bread*, 348 U. S. 115, this court approved a judgment in a treble damage suit based upon a violation of Sec. 3. While in neither case was the issue directly raised that Sec. 3 is not a part of the Clayton Act and the court's construction may be dictum, Congress has not by legislation rejected such construction. Neither has Congress rejected a similar construction by the District Courts over a long period. This is strong evidence that Congress has approved it.

ARGUMENT.

HOW THE ISSUE HAS ARISEN.

Sec. 4 of the Clayton Act (15 U. S. C. Sec. 15) gives an injured party the right to sue for damages for an injury by reason of anything forbidden by the "anti-trust laws". Sec. 16 of the Clayton Act (15 U. S. C. Sec. 26) authorizes private suits for injunctive relief against threatened damage by a violation of the anti-trust laws. Section 1 of the Clayton Act provides, in short, that the "anti-trust" laws shall include the Sherman Act, the Wilson Tariff Act and the Clayton Act, describing each act by its title. In the first code (1926) all sections of these three acts were given code section numbers. Sec. 1 became code section number 12 of Title 15. In that code Sec. 12, instead of describing these three acts by their titles, described them by the code section numbers. In the code, the respective sections of these acts appeared in Sections 1-27. In Sec. 12 of the 1926 code to which we have just referred, the anti-trust laws were described as follows: "Anti-trust laws, as used in Sections 12-27 of this title" (Title 15), includes Sections 1-27 of this title." The only change of Sec. 12 of the 1926 code made by any other code was in 1940 when Sec. 12 was made to read as follows: "Anti-trust laws as used in Sections 12, 13, 14-21 and 22-27 of this title, includes sections 1-27 of this title." Sec. 12 has been continued in subsequent codes in the same form given in 1940. It is to be observed that no change has been made in any code of the words "includes 1-27 of this title."

The Robinson-Patman Act (49 Stat. 1526) consists of Sec. 1 (consisting of Paragraphs A, B, C, D, E and F) purporting to amend Sec. 2 of the Clayton Act; and Sections

2, 3 and 4. Its full context is set up in Appendix I attached to this brief. The 1940 code, and all subsequent codes, have included all sections of the Robinson-Patman Act between Secs. 1 to 27. This was done by giving code section number 13 to Sec. 2 as amended by Sec. 1 of the Robinson-Patman Act; code section number 21-A to Sec. 2 of the Robinson-Patman Act; code section number 13-A to Sec. 3 of the Robinson-Patman Act; and code section number 13-B to Sec. 4 of the Robinson-Patman Act.

The history of the Robinson-Patman Act will be more fully described later. All sections of the act were adopted under one title and one enacting clause. (See Appendix I.) The issue is whether Sec. 3 of the Robinson-Patman Act became one of the "anti-trust laws" as defined by Sec. 1 of the Clayton Act. The Court of Appeals held it did not and hence a suit for damages and injunctive relief could not be maintained under Secs. 4 and 16 of the Clayton Act which was bottomed upon Sec. 3 of the Robinson-Patman Act.

I.

The Remarks Made by Members of Congress When the Robinson-Patman Act Was Being Considered Show That It Was the Intention of Congress That a Person Injured by a Violation of Sec. 3 Has a Cause of Action for Damages. There Is Nothing in the Report of the Conference Committee to the Contrary.

Appendix II hereto attached gives the Congressional History of the Robinson-Patman Act, with references to the Congressional Record. Appendix III hereto attached sets forth relevant comments of members of the House and Senate when the legislation was being considered, with references to the Congressional record. These mat-

ters have been set forth in appendices rather than in the body of the brief in the interest of brevity.

In the 74th Congress, Senator Robinson introduced a bill in the Senate, S. 3154. (Ap. II.) Representative Patman introduced an identical bill in the House, H. R. 8442. (Ap. II.) The Senate adopted a Committee amendment of its bill. It also adopted an amendment of the Committee bill offered by Senator Borah known as the Borah-Van Nuys amendment. (Ap. II.) The bill as so amended passed and was sent to the House. (Ap. II.) Likewise the House adopted a Committee amendment, passed its bill and sent it to the Senate, without acting on the Senate bill. (Ap. II.) The Senate amended the House bill. It agreed to a motion to insist on its amendment to the House bill and ask for a conference. (Ap. II.) The Vice-President appointed Senators Logan, Van Nuys, McGill, Borah and Austin, as conferees. (Ap. II.) The House agreed to the conference and the Chair appointed Representatives Utterback, Miller, Celler, McLaughlin, Summers, Guyer and Robinson as conferees. (Ap. II.) The Conference Committee report was agreed upon by the House and the Senate. (Ap. II.)

The amendments to S. B. 3154 occurred in the Senate in this way. Committee on Judiciary reported the bill with amendments. (Ap. II.). Senator Borah offered an amendment to the bill as amended by the Committee which he stated he offered as a separate section to S. 3154. (Ap. II.) The Committee amendments and Senator Borah's amendment (the latter known as the Borah-Van Nuys amendment) were adopted. (Ap. II.) The bill passed as amended and was sent to the Senate in that form.

The Borah-Van Nuys amendment is set forth in Appendix IV. It consisted of three paragraphs. A comparison of its provisions with Sec. 3 of the Robinson-Patman Act discloses that its first and third paragraphs are identical with the

first and second paragraphs respectively of Section 3 of the Robinson-Patman Act. The second paragraph of the Borah-Van Nuys amendment and Sec. 4 of the Robinson-Patman Act are substantially the same. These observations are confirmed by the report of the Conference Committee. (80 Cong. Rec. 9414-9415.)

The Court of Appeals was of the opinion that "The legislative history is convincing that there was no intention by Congress for Section 3 of the Robinson-Patman Act to be an amendment of the Clayton Act." In reaching this conclusion the court relied upon (1) remarks made by two of the members of the House when that body was considering the Conference Committee report and (2) the report of the Conference Committee. We submit that remarks made by members of the House and Senate clearly establish that it was intended by Congress that a remedy by a civil suit for damages was to be afforded to one injured by a violation of Sec. 3 of the Robinson-Patman Act. We further submit that the Conference Committee report furnishes no basis for the conclusion reached by the Court of Appeals. These questions will now be discussed in the order just given.

1.

Since the Borah-Van Nuys amendment eventually became Sec. 3 of the Robinson-Patman Act, absent its second paragraph only, the remarks of Senator Borah, its sponsor, at the time he submitted it are pertinent. (He was later one of the conferees of the Conference Committee.) The relevant parts of these remarks are given in Appendix III-A. They disclose that the purpose of the Borah-Van Nuys amendment was to inhibit conduct as a matter of law "without the intervention of the discretionary power of the Federal Trade Commission or other bureau." Senator Borah further stated, "That, it seems to us, should be

proi:bited as a matter of law and that there need not be any discretion laid anywhere with reference to the execution of that kind of law. That is the distinction between the bill which is now pending and the proposed amendment."

Senator Logan was Chairman of the Sub-committee which had considered S. 3154 and had reported the bill to the Senate on behalf of the Committee on Judiciary. Near the conclusion of Senator Borah's remarks given in explanation of this amendment, the following colloquy occurred (with emphasis supplied):

> "Mr. Logan: *Mr. President, may I interrupt the Senator to ask whether it is unusual to provide, for violation of a statute, a criminal prosecution and also a right to sue for damages? The two are not inconsistent.*
>
> Mr. Borah: *No; we have such a provision in the Sherman anti-trust law.*
>
> Mr. Logan: *That is what I thought.*"

From the foregoing it is clear that there was no question in the mind of either Senator but that a violation of the Borah-Van Nuys amendment would give the injured party the right to sue for damages.

When the Conference Committee report was being considered in the Senate an inquiry was made by Senator Vandenberg of Senator Van Nuys. (Ap. III-C.) The latter had been a co-sponsor of the Borah-Van Nuys amendment and was one of the conferees of the Conference Committee. In his inquiry Senator Vandenberg said that "The fact has been called to my attention that Section 3 of the bill, as agreed upon in conference, makes certain discriminations punishable by fine *and also subject to treble damages.*" (Emphasis supplied.) He then stated that similar discriminations under Section 2 (B) would be subject to rebuttal by showing that a reduced price was made in good

faith to meet competition. His concern was whether a defense allowed by Sec. 2-B would not be available under Sec. 3. In his reply Senator Van Nuys did not question Senator Vandenberg's statement that Sec. 3 made discriminations under Sec. 3 "subject to treble damages."

He merely stated that the provision to which Senator Vandenberg referred was "simply a rule of evidence rather than a part of the substantive law." It is significant that an examination of the Congressional record discloses that no Senator challenged Senator Vandenberg's statement with reference to discriminations under Sec. 3 being subject to treble damages.

Relevant remarks in the House made when the Conference Committee report was being considered are set forth in Appendix HH-B. In the interest of brevity they will not be repeated here. We submit that a reading of that appendix clearly shows that the members of the House who participated in the discussion considered that a party injured by a violation of Sec. 3 would have a cause of action for damages.

2.

The position of the Court of Appeals that the report of the Conference Committee discloses that Congress did not intend for Sec. 3 to be an amendment of the Clayton Act is not supported by the report.

Nowhere in the report of the Conference Committee upon this important item of legislation is there a syllable to indicate that Sec. 3 was not to amend the Clayton Act. That the entire bill is an amendment of the Clayton Act is discussed by us in the following part of this brief. Here we concern ourselves with the Court of Appeals position that evidence is to be found in the report that the Clayton Act was not amended by Sec. 3.

The report given by the managers on the part of House (80 Cong. Rec. 9414-9415) begins by stating that they were submitting a statement with regard to the conference on the disagreement of the two houses upon H. R. 8442, "to amend Section 2 of the act entitled "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes", approved October 15, 1914, as amended (U. S. C. Title 15, Sec. 13) and for other purposes." The report then states that "The first section of the House bill and the Senate amendment amend Section 2 of the Clayton Act and divide said Section 2 into a number of subsections. The subsections hereinafter mentioned, therefore, refer to the subsections into which it is proposed to divide Section 2 of the Clayton Act." The report then discusses the nature of the Subsections. Section 2 of the act, the report states, relates to pending rights of action "and being therefore temporary in purpose, it appears in the conference report as Section 2 of the bill itself, rather than as part of the amendment to Section 2 of the Clayton Act, which is provided in Section 1 of the present bill." Coming to Sec. 3, the report states that "It contains the operative and penal provisions of what was originally the Borah-Van Nuys bill. While they overlap in some respects, they are in no way inconsistent with the provisions of the Clayton Act amendment provided for in Section 1."

The Court of Appeals considered that because the report stated (as just quoted) that Sec. 1 of the bill was an amendment to the Clayton Act, it follows that Sec. 3 was not an amendment to the Clayton Act.

The difficulty with the position as taken by the Court of Appeals is that nowhere did the report exclude Sec. 3 as being an amendment to the Clayton Act. It is plain that the report by its Clayton Act references which we have given merely calls attention to the fact that Sec. 1 of the bill is that part that amends Sec. 2; and that it was accom-

plished by dividing Sec. 2 into a number of paragraphs. The report does no more than thus emphasize that Secs. 2, 3 and 4 are not substitutes or replacements for what had been *in Sec. 2 of* the Clayton Act; but that Sec. 2 of the Clayton Act was being replaced by what was to be found in Sec. 1 of the bill. In addition, the report harmonizes Sec. 1 of the bill and Sec. 3 by pointing out that while there may be overlapping in some respects, there was no inconsistency with those provisions of Sec. 2 of the Clayton Act which were to be amended by Sec. 1 of the bill.

We submit that it is wholly unwarranted to construe the report as excluding Sec. 3 from being an amendment to the Clayton Act.

II.

That the Entire Robinson-Patman Act Amended the Clayton Act Is Clear from the Robinson-Patman Act Itself.

The Court of Appeals concluded that because the enacting clause of the Robinson-Patman Act purports to amend only Sec. 2 of the Clayton Act; and only Sec. 1 of the Robinson-Patman Act (which section amends Sec. 2 of the Clayton Act) is enclosed by quotation marks, it follows that the Clayton Act was not amended by Sec. 3.

It is important to observe that both in the bill reported by the Conference Committee (80 Cong. Rec. 9413) and in the act itself as finally passed (Appendix I) not only were quotation marks excluded from Sec. 3, but also from Secs. 2 and 4. Thus, the only section included with quotation marks is Sec. 1.

It follows that if the use of the enacting clause purporting to amend only Sec. 2 of the Clayton Act and the presence of quotation marks only in connection with amended Sec. 2 of the Clayton Act set forth in Sec. 1 of the bill had the effect of excluding Sec. 3 as amendatory

of the Clayton Act, then Secs. 2 and 4 of the act in question are for the same reason, not amendatory of the Clayton Act. Manifestly that is not the case, because Secs. 2 and 4 of the Robinson-Patman Act are so intimately related to Sec. 2 of the Clayton Act, as amended by Sec. 1, that they are necessarily amendatory of the Clayton Act. Sec. 2 of the Robinson-Patman Act provides that "nothing herein contained" shall effect litigation pending, or orders of the Federal Trade Commission based on Sec. 2 of the Clayton Act, arising or entered prior to the effective date of "this amendatory Act." Sec. 4 is an exemption for cooperative associations which might otherwise be subject to Sec. 2 of the Clayton Act as amended by Sec. 1 of the Robinson-Patman Act. Clearly these sections are amendatory of the Clayton Act.

The first sentence of Sec. 2 of the Robinson-Patman Act, in referring to that act, uses the phrase, "*this amendatory Act*" (emphasis supplied). A proviso then follows in which the phrase "this amendatory Act" is used three times. Better evidence could not be found as to the nature of the act than by these deliberate words of Congress.

Not only did Congress call the act "this amendatory Act" in so many words, but the nature of the Act itself gives rise to the conclusion that the entire act is amendatory of the Clayton Act.

Sec. 2 of the Clayton Act, prior to its amendment by Sec. 1 of the Robinson-Patman Act, made it unlawful to discriminate in price between different purchasers of commodities where the effect of such discrimination might be to substantially lessen competition or create a monopoly in any line of commerce. Paragraph A of Sec. 1 of the Robinson-Patman Act amended Sec. 2 in some particulars, but retains the foregoing provision relating to discrimination. Without going into all of the details of Paragraphs B, C, D, and F, they forbid the giving of discounts except

for services rendered, paying a customer for services or facilities without availing the same to all customers; forbidding discriminations in connection with the furnishing of services or inducing or receiving a price discrimination.

Sec. 3 of the Robinson-Patman Act makes it unlawful to discriminate against competitors of the purchaser in giving a rebate, discount or advertising service not available to such competitors; or to sell goods at lower prices in one section of the United States than in another to destroy competition; or to sell goods at unreasonably low prices for the purpose of destroying competition.

It is clear that the entire Robinson-Patman Act has done no more than to widen the horizon of original Sec. 2 of the Clayton Act in dealing with monopolistic practices. All sections of the Robinson-Patman Act are integrated and inter-related parts of the whole. All of them deal with phases of monopolistic practices of the same general nature. The purpose of the Robinson-Patman Act is to reach the operations of large interstate businesses in competition with small local concerns (*Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231-238 (1951)), and to protect small business unable to buy in quantities. (*Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37-49 (1948).) The act barred the use of interstate business to destroy local business. (*Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115-120 (1954).)

That Congress did not specifically state that Sec. 3 was amendatory of the Clayton Act by naming the Clayton Act as being the act so amended does not foreclose Sec. 3 from having become a part of that act by amendment. We have already shown that in Sec. 2 Congress used the phrase "this amendatory Act" four times. That the act so amended was the Clayton Act, there can be no doubt for the reasons just given. A law is amended when it is permitted to remain and something is added or taken from

it or it is in some way altered to better accomplish its purpose. (*U. S.* v. *Lapp*, 244 Fed. 377-383, 6th Circuit, 1917.) Any change of the scope or effect of an existing statute, whether by addition, omission or substitution of provisions which does not wholly terminate its existence, whether by an act purporting to amend, or by an act original and independent in form, is treated as an amendment. (Sutherland Statutory Construction, 3rd Ed., 1943, Sec. 1901.) Whether an act is amendatory of a prior act is to be determined by a comparison of their provisions and its character is not determined by the fact that it does or does not profess to be an amendment. (*Rubert Hermanos* v. *People of Puerto Rico*, 106 F. (2) 754-759, First Circuit, 1939, reversed on other grounds, 309 U. S. 543, 1940.)

Supplemental statutes include every species of amendatory legislation which go to complete a legislative scheme. (*Rahway Savings Institution* v. *Rahway*, 53 N. J. Law 48, 20 At. 756-757, 1890; *First State Bank of Shelby* v. *Bottineau*, 56 Montana 363, 185 Pac. 162-164, 1919.)

The case of *First State Bank of Shelby* v. *Bottineau*, just cited, involved an issue similar upon principle with the issue here. Congress passed a homestead act in 1862. (12 Stat. 392.) It contained a provision exempting land granted under its provisions from any debt of the owner contracted prior to the issuance of the patent. In 1909, Congress passed an act entitled the "Enlarged Homestead Act." (35 Stats. at Large 639.) This act had no debt exemption provision. Neither in the title nor in the body of the act was it recited that it was an amendment of the 1862 act. The Montana Supreme Court in a well reasoned opinion held that the 1909 act amended and supplemented the 1862 act and that one who received a patent under the 1909 act was therefore entitled to the benefit of the exemption provision of the 1862 act. The conclusion of the court

was based upon the reasoning that whether an act of Congress is an amendment of an earlier act is to be determined from the intent of Congress under all the facts and circumstances that led to its passage; and that there, clearly Congress had such intention.

That all the sections of the Robinson-Patman Act are integrated parts of the whole is plain. We have already shown the relationship of Secs. 2 and 4; and the relationship between Sec. 1 (amending Sec. 2 of the Clayton Act) and Sec. 3. Sec. 4, exempting co-operatives, applies indifferently to Secs. 1 and 3. Thus, all sections of the act are inter-related.

We submit that all sections of the Robinson-Patman Act in their entirety amended the Clayton Act. Since Sec. 3 amended the Clayton Act it has certainly supplemented it in dealing with the subject of monopoly. Being a part of the Clayton Act by amendment, Sec. 3 is thus one of the "anti-trust laws" defined by Sec. 1 of that act; and a cause of action against one who violated Sec. 3 will therefore lie under Sec. 4 of the Clayton Act. Where an act is amended by a later act, the act so amended is to be read as if it had originally been in the amended form. (*Blair* v. *Chicago*, 201 U. S. 400-475, 1906; *Pennsylvania Co.* v. *U. S.*, 236 U. S. 351-362, 1915; *U. S.* v. *La France*, 282 U. S. 568-576, 1931.)

III.

The House Judiciary Committee Has, in the 1940 and Subsequent Codes, Construed Sec. 3 as Being One of the Anti-Trust Laws for Which a Remedy Is Given in the Clayton Act.

Editions of the U. S. Code are prepared and published under the supervision of the Committee on Judiciary of the House of Representatives (1 U. S. C. Sec. 202; 45 Stat.

1007, 45 Stat. 1541). That the Judiciary Committee has construed Sec. 3 as being one of the anti-trust laws for which a remedy is given in the Clayton Act is clear. It is equally clear that the Judiciary Committee has furnished us with an administrative construction:

By giving Sec. 3 the code section number 13-A in the 1940 and subsequent codes, the Committee therefore included it in the codification of Sec. 1 of the Clayton Act (15 U. S. C. 12) in which the anti-trust laws are stated to include Secs. 1-27. Since Sec. 4 of the Clayton Act (15 U. S. C. 15) gives an injured party a cause of action by reason of anything forbidden by the "anti-trust laws", the committee must have considered that Sec. 3 of the Robinson-Patman Act is one of the anti-trust laws for which there is a remedy under the Clayton Act.

An established administrative interpretation of a statute should not be overruled except for weighty reasons. (*Commissioner of Internal Revenue* v. *Sternberger*, 348 U. S. 187-199, 1955.) Despite the passage of seventeen years since the committee placed the interpretation upon Sec. 3 to which we have referred, Congress has not disagreed. The failure of Congress to alter or amend an act notwithstanding a consistent construction by the Department charged with its enforcement creates a presumption in favor of the administrative interpretation to which great weight should be given. (*Costanza* v. *Tillinghart*, 287 U. S. 341-345, 1932.)

IV.

In Two Previous Cases Where the Issue Was Not Raised, This Court Has Adopted a Construction of Sec. 3 Giving a Party a Cause of Action for Damages on Account of a Violation of Sec. 3.

In *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743, 1947, the court stated (p. 774) that the question involved was whether renewal notes given for the sale of goods are uncollectible if the vendor violated the "Robinson-Patman Act (June 19, 1936) 49 Stat. 1526, 1528, C592, 15 U. S. C. A. Secs. 13, 13-A." At p. 750 the court said, "The Act prescribes sanctions, and it does not make uncollectibility of the purchase price one of them. Violation of the Act is made criminal and upon conviction a violator may be fined or imprisoned. 49 Stat. 1528, C592, 15 U. S. C. A. Sec. 13a, 4 F. C. A. title 15, Sec. 13a. Any person who is injured in his business or property by reason of anything forbidden therein may sue and recover threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fee. (October 15, 1914) 38 Stat. 730, 731, C323, 15 U. S. C. A. Sec. 15, 4 F. C. A. title 15, Sec. 15. This triple damage provision to redress private injury and the criminal proceedings to vindicate the public interest are the only sanctions provided by Congress."

In the case of *Moore* v. *Mead's Fine Bread*, 348 U. S. 115, 1955, the opening paragraph of the opinion states that, "This is a suit for treble damages, 38 Stat. 731, 15 U. S. C. Sec. 15, brought for violations of Sec. 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. Sec. 13(a), and of Sec. 3 of the Robinson-Patman Act, 15 U. S. C. Sec. 13(a)."

The plaintiff had been given a judgment in the District Court. The Court of Appeals reversed upon the

grounds that local transactions only were involved. This court reversed the Court of Appeals and affirmed the District Court, holding that "the practices in the present case are within the scope of the anti-trust laws." Nothing was said in the opinion as to whether a cause of action would lie for damages under Sec. 3, but the court must have considered the question in the affirmative. Otherwise the court would not have sustained the judgment of the District Court.

It is true that in both of the cases just cited the issue was not raised as to whether a party injured by a violation of Sec. 3 has a remedy for damages under the Clayton Act. However, the fact remains that despite the construction placed upon Sec. 3 in the *Bruce's Juices* case in 1947 and in the *Moore* case in 1955, Congress has enacted no legislation to the contrary. Where the Supreme Court places a construction upon an act and Congress does not then amend it, it must be taken as clear that Congress approves the construction. (*Baltimore and Ohio Railroad Company* v. *Baugh*, 149 U. S. 368-372, 1892; *U. S.* v. *Elgin, Joliet and Eastern Railway Co.*, 298 U. S. 492-500, 1936.)

It is also worthy of consideration that the District Courts have generally sustained suits for treble damages under Sec. 3 of the Robinson-Patman Act. (*Atlanta Brick Co.* v. *O'Neal*, 44 F. Supp. 39, D. C. E. D. Tex., 1942; *A. J. Goodman and Son* v. *United Lacquer Mfg. Corp.*, 81 F. Supp. 890, D. C. Mass., 1949; *Spencer* v. *Sun Oil Co.*, 94 F. Supp. 408, D. C. Conn., 1950; *Balian Ice Cream Co.* v. *Arden Farms*, 94 F. Supp. 796, S. D. Calif., 1950; *Myers* v. *Shell Oil Co.*, 96 F. Supp. 670, D. C. S. D. Calif., 1951; Supp. 603, D. C. N. D. Calif., 1954; *Waldes Kohinoor, Inc.* v. *Stabile*, 140 F. Supp. 916, S. D. N. Y., 1956.)

CONCLUSION.

Petitioner submits that Sec. 3 of the Robinson-Patman Act is one of the anti-trust laws as defined by Sec. 2 of the Clayton Act and that it is therefore entitled to maintain a suit for damages and injunction under the provisions of Sec. 4 of the Clayton Act. For the foregoing reasons the judgment of the Court of Appeals, Seventh Circuit, should be reversed.

Respectfully submitted,

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APPENDIX I.

The Robinson-Patman Act.

49 Stat. 1526.
[Public—No. 692—74th Congress.]
[H.R. 8442.]

AN ACT.

To amend section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U. S. C., title 15, sec. 13), and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., title 15, sec. 13), is amended to read as follows:

"Sec. 2 (a) That *it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities* of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of com-

merce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing here-

in contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

"(c) That it shall be unlawful for any person engaged in commerce in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

"(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

"(e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

"(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

SEC. 2. That nothing herein contained shall affect rights of action arising, or litigation pending, or orders of the Federal Trade Commission issued and in effect or pending on review, based on section 2 of said Act of October 15, 1914, prior to the effective date of this amendatory Act: *Provided*, That where, prior to the effective date of this amendatory Act, the Federal Trade Commission has issued an order requiring any person to cease and desist from a violation of section 2 of said Act of October 15, 1914, and such order is pending on review or is in effect, either as issued or as affirmed or modified by a court of competent jurisdiction, and the Commission shall have reason to believe that such person has committed, used or carried on, since the effective date of this amendatory Act, or is committing, using or carrying on, any act, practice or method in violation of any of the provisions of said section 2 as amended by this Act, it may reopen such original proceeding and may issue and serve upon such person its complaint, supplementary to the original complaint, stating its charges in that respect. Thereupon the same proceedings shall be had upon such supplementary complaint as provided in section 11 of said Act of October 15, 1914. If upon such hearing the Commission shall be of the opinion that any act, practice, or method charged in said supplementary complaint has been committed, used, or carried on since the effective date of this amendatory Act, or is being committed, used or carried on, in violation of said section 2 as amended by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and serve upon such person its order modifying or amending its original order to include any additional violations of law so found. Thereafter the provisions of section 11 of said Act of October 15, 1914, as to review and enforcement of orders of the Commission shall in all things apply to such modified or amended order. If upon review as

provided in said section 11 the court shall set aside such modified or amended order, the original order shall not be affected thereby, but it shall be and remain in force and effect as fully and to the same extent as if such supplementary proceedings had not been taken.

SEC. 3. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.

SEC. 4. Nothing in this Act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association.

APPENDIX II.

History of Robinson-Patman Act.

H. R. 8442 was introduced in the 74th Congress by Representative Patman and referred to the Committee on Judiciary June 11, 1935 (79 Cong. Rec. 9081) S. 3154 was introduced in the same Congress by Senator Robinson and referred to the Committee on Judiciary June 26, 1935. (79 Cong. Rec. 10129.) The two bills when introduced were identical. (See remarks by Senator Robinson, 80 Cong. Rec. 6278.) Senator Borah and Senator Van Nuys introduced S. 4171 at the same Congress on March 4, 1936. (80 Cong. Rec. 3204.)

Senator Logan reported S. 3154 favorably from the Committee on Judiciary with an amendment on February 3, 1936. (80 Cong. 1333.) He stated that he was Chairman of the Sub-Committee to which the bill had been referred and had been directed by the Committee on Judiciary to report the bill (80 Cong. Rec. 3119) and that the bill was the Robinson bill with amendments. (80 Cong. Rec. 3119.) After the Committee report of the bill by Senator Logan, Senator Borah stated that he would offer the adoption of the Borah-Van Nuys bill as an amendment to the Robinson bill. (80 Cong. 6276.) Later the Senate proceeded to consider S. 3154 on Senator Robinson's motion. (80 Cong. Rec. 6279.) Senator Logan asked unanimous consent that the committee amendment be first considered. (80 Cong. Rec. 6279.) The Presiding Officer stated "Without objection it is so ordered. The Clerk will read the amendment in the nature of a substitute." (80 Cong. Rec. 6279.) The clerk read the full text. (80 Cong. Rec. 6279.) After the Clerk concluded reading the Com-

mittee amendment the Presiding Officer ruled that "Any amendment to be offered should be offered before the pending amendment is agreed to, because it is an amendment in the nature of a substitute." (80 Cong. Rec. 6280.) Thereafter, Senator Borah offered his amendment. He was asked by Senator Logan, "How the Senator's amendment should be included in the Robinson Bill." He replied, "I will offer it as a new section." Senator Borah's amendment was agreed to as an amendment to the committee amendment. (80 Cong. Rec. 6351.) Thereafter on April 30, 1936 the bill was ordered engrossed for a third reading, read for a third time and passed. (80 Cong. Rec. 6436.)

H. R. 8422 was passed by the House (80 Cong. Rec. 8442) after having adopted a committee amendment (80 Cong. Rec. 8241) and was sent to the Senate. (80 Cong. Rec. 8279.) On May 30, 1936, Senator Robinson stated in the Senate that the House, instead of acting on the Senate bill which had been sent to it, had passed its own bill without notice of the Senate bill. (80 Cong. Rec. 8403.) He then stated that it was his purpose to ask the Senate to strike out all of the House bill after the enacting clause and to insert in lieu thereof the original Senate bill so that the whole subject might be in conference. (80 Cong. Rec. 8403.) He offered the amendment. (80 Cong. Rec. 8418.) It was agreed to (80 Cong. Rec. 8419) and the bill was read a third time and passed as so amended. (80 Cong. Rec. 8419.) Senator Robinson then moved that the Senate insist on its amendment, ask for a conference and that the Chair appoint conferees on the part of the Senate. (80 Cong. Rec. 8419.) The motion was agreed to and the Vice-president appointed Senators Logan, Van Nuys, McGill, Borah and Austin as conferees. (80 Cong. Rec. 8419.) The House agreed to the conference and the Chair appointed Representatives Utterback, Miller, Celler, McLaughlin, Summers, Guyer and Robinson as conferees. (80 Cong. Rec. 8617.)

The Conference Committee report was submitted to the House and agreed upon. (80 Cong. Rec. 9422.) Likewise in the Senate the Conference Committee report was submitted and agreed upon. (80 Cong. Rec. 9202.)

APPENDIX III.

(All emphasis supplied.)

A.

Remarks in the Senate Upon the Offering of the Borah-Van Nuys Amendment to S. 3154.

Senator Borah said (80 Congressional Record 6346): "Mr. President, *the amendment is designed to cover certain specific matters which we think ought to be inhibited as a matter of law, certain things which we think ought to be prohibited without the intervention of the discretionary power of the Federal Trade Commission or other bureau.* The matters which we propose to prohibit that of allowing discount or rebate or allowance for advertising service charge to one purchaser without making it available to each and every other purchaser. *That, it seems to us, should be prohibited as a matter of law, and that there need not be any discretion laid anywhere with reference to the execution of that kind of law. That is the distinction really between the bill which is now pending and the proposed amendment.*

It is not our purpose to embarrass or impede the action upon the main measure, but we shall ask that it be adopted as an amendment, believing that the two propositions can be reconciled when the bill goes to conference, and that we can save the principles of both."

Further on (p. 6348), the following appears:

> "Mr. Logan. I agree with the Senator; but under the Robinson bill the merchant may bring suit in the courts to recover damages. However, the only question that arises in my mind just now is as to how the

Senator's amendment should be included in the Robinson bill.

Mr. Borah. *I will offer it as a new section.*

Mr. Logan. That would be satisfactory to me, I am quite sure.

Mr. King. Mr. President, will the Senator yield?

Mr. Borah. Just a moment. I was about to say that from what we know of the situation in the House they will probably offer their bill as a substitute for this measure.

The bill of the Senator from Arkansas (Mr. Robinson), the bill offered by the Senator from Indiana (Mr. Van Nuys) and myself, and the House measure will be in conference, and from those measures I should think some satisfactory law ought to be worked out.

Mr. Logan. I think that is true, Mr. President; and if I understand it, the entire bill, if that should happen, could be rewritten by the conferees, and such amendments as might be deemed necessary could be added by the conferees if the House should substitute its own bill. Then the whole thing would be open, as I understand.

Mr. Borah. Yes.

Mr. King. Mr. President, will the Senator from Idaho permit an interruption?

Mr. Borah. I yield.

Mr. King. Does the Senator perceive any incongruity between the bill which he has offered—and I refer particularly to the penal provision—and the so-called Robinson bill, where the remedy is by suit for damages, based upon whatever damages may be sustained by reason of so-called discrimination?

Mr. Borah. *My view is that there are certain practices so obviously improper and unjust that they ought to be prohibited by specific provision of law, and that indulging in them ought to constitute a crime.* There are things like the granting of quantity discounts which are difficult to cover by a specific provision of law and make the violation punishable, but when we come to the special discount allowance, or rebate allowance, or service-charge allowance, or advertising allowance,

to one party and the refusal of it to another, that is a fraudulent transaction.

Mr. King. It seems to me that the Clayton Act, particularly section 2, and the Sherman anti-trust law, pretty effectively deal with the evils of which the Senator complains and which this proposed bill seeks to prevent.

Mr. Borah. In a sense, that is correct, but when the businessman knows positively that if he does a thing he will be subject to criminal prosecution, that is a great deterrent. And it is not a thing about which he might be honestly misled. If he makes these allowances to one and refuses them to another, if he makes rebates to one and refuses them to another, it is a matter wholly within his knowledge, and done after full consideration and full knowledge of what he is doing.

Mr. Logan. *Mr. President, may I interrupt the Senator to ask whether it is unusual to provide, for violation of a statute, a criminal prosecution and also a right to sue for damages? The two are not inconsistent.*

Mr. Borah. *No; we have such a provision in the Sherman antitrust law.*

Mr. Logan. *That is what I thought.*"

B.

Remarks in the House Upon the Consideration of the Conference Committee Report:

The full context of the Conference Committee report is given in the Congressional Record when the report was called up for consideration in the House by Rep. Utterback. (80 Cong. Rec. 9413-9415.) This is followed by a discussion of the report by Rep. Utterback. (80 Cong. Rec. 9415-9419.) There immediately follows a discussion by Rep. Celler who was a member of the Conference Committee

but did not sign the report because he did not agree to it. (80 Cong. Rec. 9419.)

> "Mr. Speaker, I shall not consume the 5 minutes. *I simply want to get the record clear*, because, of course, *in endeavoring to interpret properly the language of statutes, the courts must, perforce, look to the statements that appear in the record on debate.*
>
> Bills ofttimes are vague and ambiguous. *To clear* up much of uncertainty, or rather to point it out, it is my purpose in arising."

Rep. Celler discussed some of the features of the bill (p. 9419). He then yielded for questions by other members of the House. The following are the pertinent parts of the discussion that ensued (p. 9420):

> "Mr. Boileau. I understand the Borah-Van Nuys is a separate and distinct section from the House provision and some of the conferees on the part of the House have stated to me that there is no inconsistency and that the House provisions prevail, but that the Borah-Van Nuys amendment is simply an additional remedy.
>
> Mr. Celler. I ask the gentleman to read section 3, the Borah-Van Nuys provision, and then read section 2 and section 1 and see whether that is so.
>
> *Also let me point out that this bill is an amendment to the Clayton Act, which provides that anyone aggrieved by any discrimination in price or discount or allowance can sue and recover triple damages from the person guilty of the discrimination. In addition for the same act of discrimination, to the triple damages* the business man can by section 3 of this bill, be hailed to court and fined $5,000 or imprisoned for 1 year. I ask you to think carefully before you accept such a bill with such penalties. * * * Mr. Hancock of New York. If a vendor is found guilty of discrimination as provided in this bill, is he subject to the aggrieved party for damages or has he committed a crime and subjected himself to penalty?
>
> Mr. Celler. If he violates the Borah-Van Nuys pro-

vision of the bill he is subject to penalties of a criminal nature and has committed an offense.

Mr. Hancock of New York. *Would he also be liable for triple damages?*

Mr. Celler. *And he would also have to respond in triple damages under the provisions of the Clayton Act. Anyone aggrieved can sue.*"

At the conclusion of Rep. Celler's remarks, Rep. Miller, a member of the Conference Committee took over the discussion. He explained (p. 9421) that when the House bill reached the Senate the latter struck out all after the enacting clause and substituted its own bill; that the bill then went to Conference Committee and that the bill reported by the Conference Committee "is substantially the House bill, rearranged, including the Borah-Van Nuys amendment which is section 3 of the bill.". The following are the pertinent parts of the discussion (p. 9421) that then appear:

"Mr. Miller.' Section 3 is the Borah-Van Nuys amendment. We accepted that amendment for this reason and this reason only. The first section of the bill as reported back here amends section 2 of the Clayton Act. That is the House bill substantially and when I say to you it is substantially the House bill, every amendment that was offered in the Senate was receded from by the Senate. * * *

Mr. Massingale. Does the bill agreed to by the conferees carry the penalty of triple damages and also a penalty under the criminal law?

Mr. Miller. The penalty of triple damages is the old law. In other words we made no change in that particular provision of the Clayton Act. Section 3, which the gentleman from New York talks about, is the Borah-Van Nuys amendment, and that is the criminal section of this bill. The first part of this bill has nothing to do with criminal offenses. It deals primarily, in my opinion, with the authority of the Federal Trade Commission to regulate and enforce the

provisions of Section 2 of the Clayton Act as amended. Section 3 in the bill is placed in an effort to make the criminal offense apply only to that particular section, and I believe that is a reasonable construction, if you will look at the bill.

Mr. Massingale. There is no criminal offense involved for anything outside of what is contained in that section?

Mr. Miller. In Section 3.

Mr. Hancock of New York. *Is it not perfectly clear that any vendor who discriminates in price between purchasers is guilty of a crime and is also subject to triple damages to any one who claims to be aggrieved?*

Mr. Miller. *That is true*, but the criminal part is included in section 3 and section 3 only.

Mr. Hancock of New York. *But is it a part of the same act?*

Mr. Miller. *Of course it is*, but it is not a part of the Clayton Act as amended by section 2. It ought to be as far as that is concerned, if a seller willfully discriminates. * * *

* * * * *

Mr. Celler. It is possible, of course, for a man to violate section 3 and by the same act be guilty of violation of the other sections of the bill?

Mr. Miller. That would be entirely possible.

Mr. Celler. *So that he would be subject to triple damages as well as criminal prosecution.*

Mr. Miller. *That would be entirely possible.*

* * * * *

Mr. Miller. Mr. Speaker, *I want to say that Congress really wants a bill amending the Clayton Act* and desires to retain the three objectives of the House bill, the conferees on the part of the House, excluding myself, did a good job and brought back to the House a bill which thoroughly represents, in their opinion, and in my opinion, the expressed will of the House as indicated by the passage of the Patman bill."

C.

Remarks in the Senate Upon Consideration of Conference Committee Report.

When the Conference Committee report was being considered in the Senate, the following colloquy occurred between Senator Vandenberg and Senator Van Nuys who had been one of the conferees (80 Cong. Rec. 9903):

"Mr. Vandenberg: Mr. President, I should like to ask the Senator from Indiana one or two questions about the conference report.

The fact has been called to my attention that section 3 of the bill, as agreed upon in conference, makes certain discriminations punishable by fine and also subject to treble damages, while similar discriminations under section 2 (b) would be subject to rebuttal by showing, for instance, that a reduced price was made in good faith to meet an equally low price of a competitor. In other words, it is asserted to me that the defense allowed under section 2 (b) is not permitted under section 3, although the act or the offense would be the same.

Mr. Van Nuys: I think the Senator is mistaken there. The proviso to which he refers is simply a rule of evidence rather than a part of the substantive law. If a prima facie case is made against an alleged unfair practice, the respondent may rebut the prima facie case by showing that his lower prices were made in good faith to meet the prices of a competitor. That is a rule of evidence rather than substantive law."

APPENDIX IV.

The Borah-Van Nuys Amendment.

The Borah-Van Nuys amendment, which was offered by Senator Borah as Sec. 2 of the bill (80 Cong. Rec. 6346) reads as follows (80 Cong. Rec. 6349):

Sec. 2. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminate to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Nothing in this section shall prevent a cooperative association from returning to producers or consumers, or a cooperative wholesale association from returning to its constituent retail members, the whole, or any part of, the net surplus resulting from its trading operations in proportion to purchases from, or sales to, the association.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 1 year, or both.